

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1868-CR

Cir. Ct. No. 2013CF66

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

JESSE N. SCHWARTZ,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 REILLY, J. Police responding to a hit-and-run accident forced their way into and searched Jesse Schwartz's residence without a warrant, resulting in four drug charges against Schwartz. The circuit court suppressed the drug

evidence, finding that police did not have a valid reason for searching Schwartz's residence. We affirm. Neither the community caretaker nor the protective sweep exceptions to the Fourth Amendment's warrant requirement justified the search as police did not have a reasonable basis to believe that another individual was in the residence at the time of the search. As this conclusion is dispositive of the issue presented in this appeal, i.e., suppression of the evidence for the drug charges, we do not reach the question of whether the police were justified to enter Schwartz's residence to check on his well-being under their community caretaker function.

BACKGROUND

¶2 Sheboygan police were investigating a hit-and-run accident involving a parked car that they suspected was struck by a van owned by Schwartz. Police located Schwartz's van parked outside of his residence and observed significant damage to the van's front bumper in addition to a cracked windshield. Police approached Schwartz's residence and, through a window, saw a man lying on a couch who matched Schwartz's description. Police also observed two empty gun magazines and a rifle round on a table near the couch. Police knocked on the front door and windows to Schwartz's residence and had a neighbor call Schwartz's cell phone but received no response. The neighbor told police that Schwartz lived alone and that, although a girlfriend occasionally stayed over, the girlfriend did not appear to be present as her vehicle was not there.

¶3 Four or five police officers subsequently forced their way into the residence with a battering ram. Upon entry, the man on the couch, later identified as Schwartz, "immediately jumped up." Two officers placed Schwartz in handcuffs while the other officers searched the residence's second floor, main floor, and basement. In a corner of the basement, police observed an open

plywood door behind which appeared to be marijuana plants. Police secured the scene until they obtained a search warrant for drugs. Schwartz was thereafter charged with manufacturing marijuana, maintaining a drug trafficking place, possession of marijuana, and possession of drug paraphernalia.

¶4 Schwartz moved the circuit court to suppress the drug evidence on the grounds that the entry to and search of his home were unconstitutional. At the suppression hearing, the State argued that the entry and search were lawful as they were undertaken pursuant to the “community caretaker” and/or “protective sweep” exceptions to the Fourth Amendment’s warrant requirement. The circuit court granted Schwartz’s motion. The court found that while police might have been justified in their initial entry to check on Schwartz’s condition, they did not have an objectively reasonable basis to believe someone else was in the residence to support the subsequent search under either the community caretaker or protective sweep exceptions. The State appeals.

STANDARD OF REVIEW

¶5 In reviewing a court’s decision on a motion to suppress evidence, we uphold a circuit court’s findings of fact unless clearly erroneous. *State v. Sykes*, 2005 WI 48, ¶12, 279 Wis. 2d 742, 695 N.W.2d 277. “[W]e review de novo the circuit court’s application of constitutional principles to those facts.” *Id.*

DISCUSSION

¶6 Warrantless searches are per se unreasonable and violate the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution unless justified by one of “a few well-delineated exceptions.” *State v. Maddix*, 2013 WI App 64, ¶13, 348 Wis. 2d 179, 831

N.W.2d 778. These exceptions include when police are performing a community caretaker function for members of the public who need assistance. *State v. Kramer*, 2009 WI 14, ¶¶17, 32, 315 Wis. 2d 414, 759 N.W.2d 598. Additionally, “[w]hen officers enter a residence pursuant to the community caretaker exception, they may also undertake a protective sweep when they reasonably believe, under the totality of the circumstances, that such a search is necessary to assure the safety of officers and others.” *Maddix*, 348 Wis. 2d 179, ¶15.

¶7 One of the elements necessary to support a search conducted pursuant to the police’s community caretaker function is “an ‘objectively reasonable basis’ to believe there is ‘a member of the public who is in need of assistance.’” *State v. Ultsch*, 2011 WI App 17, ¶15, 331 Wis. 2d 242, 793 N.W.2d 505. Likewise, for a search to constitute a valid protective sweep, police must have “a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the [police] in believing that the area swept harbored an individual posing a danger to the officer or others.” *State v. Sanders*, 2008 WI 85, ¶32, 311 Wis. 2d 257, 752 N.W.2d 713 (quoting *Maryland v. Buie*, 494 U.S. 325, 327 (1990)).

¶8 The State argues that the warrantless search of Schwartz’s residence was reasonable as police were concerned for their own safety as well as for the safety of a second possible person within the residence. The State thus essentially argues that the police were performing both a protective sweep and a community caretaker function in their search of Schwartz’s residence in which they were searching for unknown persons “who either (1) posed a danger to the police, or (2) were themselves in danger and in need of police assistance.” The State contends that the presence of the empty gun magazines and rifle round on the table near Schwartz made it possible that someone else in the residence was armed and might

ambush police. Additionally, the State argues that police were concerned that a second person was in the van with Schwartz at the time of the accident and that person was injured somewhere in the residence. The State’s argument fails under either of these exceptions, however, as it cannot point to any objectively reasonable basis for the police to believe that there was another individual in Schwartz’s residence.

¶9 The State acknowledges that police “had no affirmative knowledge that such a person existed,” but argues “there was also no evidence to preclude the existence of such a person.” The absence of contrary evidence alone, however, does not provide an “objectively reasonable basis” nor is it a “specific and articulable” fact warranting police to believe such a person is present on the scene—let alone that such a person is dangerous or in danger. Furthermore, the fact that police searched the entire residence without first asking Schwartz whether anyone else might be there is relevant to the overall question of whether the search was reasonable. See *Maddix*, 348 Wis. 2d 179, ¶36. The State bears the burden of proving that police actions fall within an exception to the warrant requirement. *State v. Kruse*, 175 Wis. 2d 89, 97, 499 N.W.2d 185 (Ct. App. 1993). The State does not meet this burden for the community caretaker or protective sweep exceptions by showing only the possibility that another person may be present without any facts supporting such an inference. Cf. *State v. Lee*, 2009 WI App 96, ¶14, 320 Wis. 2d 536, 771 N.W.2d 373.

¶10 As we affirm the court’s suppression of the drug evidence against Schwartz on the ground that the search of Schwartz’s residence was unlawful, we need not address Schwartz’s cross-appeal challenging the circuit court’s finding that entry was justified under the community caretaker exception.

By the Court.—Order affirmed.

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